

No. 11404

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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EDWARD C. COMMERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

FILED

SEP 19 1946

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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[1\*]

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\* Page numbering appearing at foot of page of original Reporter's Transcript.

In the District Court of the United States in and  
for the District of Montana, Helena Division

No. 276

EDWARD C. COMMERS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Be It Remembered that on March 26, 1946, the Amended Petition For Declaratory Judgment of the Petitioner Edward C. Commers was filed in the above-entitled cause in the words and figures following, to-wit: [2]

[Title of District Court and Cause.]

### AMENDED PETITION FOR DECLARATORY JUDGMENT

Comes now the petitioner above named, and for himself and for all other persons similarly situated who shall join in this proceeding, and files this his amended petition, and respectfully shows:

#### I.

That petitioner is a native born citizen of the United States, and is a resident of the City of Helena, Montana, and has never been convicted of crime;

#### II.

That on December 7th, 1941, the Empire of Ja-



pan, a member of a coalition composed of Germany, Italy, and Japan, commonly referred to as the Axis, attacked the United States of America, respondent herein, at Pearl Harbor in the Hawaiian Islands in the Pacific; that immediately thereafter the United States declared war upon the members of the Axis, and ever since such declaration of war a state of war has existed and still exists between the United States of America and said Axis, said war being commonly known and referred to as World War II;

### III.

That under the Selective Service Act of Congress of September 16, 1940, and amendatory and supplementary acts of Congress, the respondent drafted all of the manpower of the United States between the ages of seventeen and sixty-five years into the military service of the United States to defend [3] it, the said United States of America, respondent herein, against its said enemies in said war; that under said draft about fifteen million citizens of the United States were under said Selective Service Act and amendatory and supplementary acts of Congress, inducted into, or otherwise enrolled in, the armed forces of respondent and served in active duty in said armed forces in said war; that several million of such citizens were young men from seventeen to twenty-five; that the citizens so drafted as hereinabove set forth were taken from school, from positions, or from business, in every walk of life;

## IV.

That on the 19th day of October, 1942, the respondent, acting through its War Department, and under said Selective Service Act and amendatory and supplementary acts, drafted or conscripted petitioners into said military service of respondent in said war, and that from said 19th day of October, 1942, until August 6th, 1945, upon which date petitioner was discharged from said military service, petitioner served on active duty in the army of the United States in said war, under the control and direction of the War Department of respondent;

## V.

That petitioner received infantry training in said army at Camp Walters, in the State of Texas, and in June, 1943, was assigned to the Sixth Division of the United States Army, being an infantry division, and served with that division through all the campaigns hereinafter mentioned, and until his discharge on August 6th, 1945; that on or about the 20th day of September, 1943, said division was sent to Honolulu, where it remained until February 4th, 1944;

## VI.

That on or about February 4th, 1944, said Division [4] embarked for New Guinea, landing at Milne Bay, proceeding thence to Toem, on Maffin Bay, New Guinea, relieving the 158th Regimental Combat Team under the command of General Hanford McNider, which Combat Team had

made a previous landing at and had occupied Toem;

#### VII.

That from the time of reaching Toem, on or about June 11, 1944, until August 23, 1944, said Division was in contact and combat continuously with the enemy, the jungle around Toem being full of Japs, and patrol fighting being practically continuous; that at Toem an enemy high-explosive shell exploded near petitioner, throwing him into a ditch and injuring his arm;

#### VIII.

That from Toem, in the latter part of August, 1944, said Sixth Division moved up to Sansapore, New Guinea, being under air attack en route, and at Sansapore was in constant contact with the enemy until the latter part of December, 1944, when said Division embarked in a large convoy for Linguayan Gulf, on the Island of Luzon;

#### IX.

That the 6th Division landed at Linguayan Gulf on January 9th, 1945, and fought its way down the Luzon Plains to the Shimbu Line, where the Japs had established themselves in control of the water supply of Manila; in this movement the First Cavalry Division covered our right flank; that we broke the Shimbu Line and took control of the water supply, and then chased Yamashita, commonly known as the Tiger of Malaya, and his men into the mountains north of Manila, where he later sur-

rendered; that on this campaign the 6th Division was in constant contact and combat with the enemy for one hundred and twelve days without relief and practically without removing their clothes; [5]

#### X.

That in February, 1945, at Markina Watershed, on Luzon, petitioner was injured in the right hand by a mortar burst; that about March 4, 1945, at Bayanbayanan, petitioner was injured in the back and legs by an artillery burst, nineteen pieces of metal being later removed from his body; that about April 5th, 1945, petitioner was showered with splinters of metal from a rocket bomb at Novaliches, receiving a severe concussion and being again injured in the back and legs by the impact and penetration of pieces of metal;

#### XI.

That on April 10, 1945, petitioner, who was then suffering from varicose veins in his legs, was flown from Manila to the hospital at Leyte as a litter case for surgical care and treatment for such varicose veins and to relieve constriction of the muscles of the leg, he being no longer able to perform duty in the field;

#### XII.

That petitioner was during his service awarded two silver stars, one individual bronze star, three purple hearts, and a good conduct medal;

#### XIII.

That petitioner, as well as most of his outfit,

while in such service, suffered from dysentery, malaria, tropical rot, and other diseases and tropical maladies coming from the foul and poisonous conditions under which they served continuously from February 4th, 1944, until after April 10, 1945; and from the effects of the drugs fed to the men daily as an antidote for the poisonous conditions; that petitioner has constantly recurring attacks of malaria, or seizures comparable to malaria, and is likely to require hospitalization from time to time; [6]

## XIV.

That because of said injuries and sickness and the resulting disabilities petitioner has been since prior to his discharge from the army and still is totally unable to follow any substantial gainful occupation at manual work, continuously or at all; that prior to his induction he made his living at manual work; that prior to his induction petitioner engaged habitually in athletics and athletic sports, but is now unable to do so; that it is reasonably certain that said disabilities will continue in a totally disabling degree throughout the life of petitioner;

## XV.

That by reason of the foregoing, petitioner has been damaged beyond the power of respondent to restore; but that he has been damaged financially to the extent of the cost of a comfortable livelihood, comparable to that enjoyed by the average citizen in comfortable financial circumstances; the cost of all necessary or beneficial hospitalization,

and the cost of such education or vocational training as will enable petitioner to receive as much enjoyment out of his remaining life as is reasonably possible;

#### XVI.

That the respondent has paid no part of said damage and injury to petitioner, but refuses to recognize any obligation to petitioner or to the others of the two or three million men disabled in this war, and denies any right in petitioner to compensation for his loss of ability to carry on as above set forth; that the only recognition the respondent has given to the plight of these men, including petitioner, is to establish an eleemosynary institution, styled the Veterans Administration, which dispenses to a few of said disabled men petty amounts as gratuities, or charity, and provides hospitalization in certain cases if the veteran will [7] sign a pauper affidavit; that petitioner, although totally disabled, receives in the form of such charitable contributions from said Veterans Administration the sum of Thirty-four and 50/100 Dollars per month while out of the hospital, not more than 25% of the amount necessary to maintain a citizen of the United States in decent comfort consistent with current living costs and standards; that while in hospital he receives the sum of Twenty Dollars per month; that immediately prior to his induction petitioner was capable of earning, and was earning and receiving for his services, at manual work, the sum of at least \$200.00 per month;

## XVII.

That the respondent is amply able to pay that which is due petitioner and the two or three million other disabled men and women of this war, and the dependents of those who died in defense of this country; that the people of the United States made in said war at least three hundred billion dollars of profit; that under its taxing power, expanded by the emergency, and available until its obligation to the lives that were wrecked by war service is provided for, respondent has ample means of raising the necessary money with which to recompense, as far as money may do, the men and women who have been disabled in its military service in the war against the Axis Powers;

## XVIII.

That the body of petitioner was taken by respondent by virtue of said acts of Congress, and acting through its War Department and the officers and agents thereof, for a public use, to-wit, the defense of the United States against its enemies, and was used by said respondent for such purpose, and as the direct result of such use the body of petitioner has been injured and damaged and his earning power destroyed as herein set forth; [8]

## XIX.

That on the 4th day of July, 1776, the Thirteen American Colonies, styling themselves the Thirteen United States of America, adopted a Declaration of Independence, declaring,

“We hold these truths to be self-evident—

that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness;”

that the Revolutionary War was fought upon this premise, and upon its conclusion the people of the colonies became free men, and the owners of their own bodies and captains of their own political destinies;

## XX.

That in the year 1787, a constitutional convention was held at Philadelphia, Pennsylvania, at which convention representatives from the colonies, after three months or more of deliberation, adopted a constitution, the preamble to which recites, among other things:

“We the people of the United States, in order to \* \* \* establish justice \* \* \* and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America;”

## XXI.

That thereafter, in the year 1789, the states, consistently with the provisions of said constitution, ratified a series of amendments to said constitution, among which is the Fifth Amendment, which provides, among other things, that “No person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation;” also the Seventh Amendment, which pro-



vides that in common law action involving more than \$20.00 the right to trial by jury shall be preserved;

## XXII.

That thereafter, between February 1, 1861, and December [9] 18, 1865, the Thirteenth Amendment to said constitution was ratified by the necessary majority of the states, the first section of said amendment reading as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

## XVIII.

That under the pronouncement contained in said Declaration of Independence, and under said constitution and the amendments thereto above set forth or referred to, the body of petitioner is his own, and the earning power of his body is his property, and not the property of the United States or of any other group of its citizens; that under the institutions of liberty established by the Constitution each citizen has equal right to life, liberty and the pursuit of happiness, and each citizen has an equal share in the sovereignty of the United States; that when in the course of human events a part of such citizens are required by law to sacrifice their liberty, the pursuit of happiness, and the integrity of their bodies, in the common defense, they do not thereby become the slaves, serfs, or chattels of those who do not fight; to be sacrificed

without obligation; but under the compact under which we live, those disabled in the common defense are entitled, not only as a matter of natural right, as between sovereigns, but by the express terms of the Fifth Amendment to said constitution, to be restored as near as may be to a dignified and honorable status among the sovereign people of this democracy, and to just compensation; and they also have the right, as a corollary to the main proposition, to the due process of law and the jury trial in establishing that obligation, guaranteed by said constitution and its amendments;

#### XXIV.

That just compensation for such use means adequate [10] compensation for physical impairment, and consequent loss of earning power, and education, training, and necessary hospitalization, which will enable petitioner to enjoy a comfortable living comparable to that enjoyed by the average citizen in comfortable circumstances;

#### XXV.

That all laws of Congress now in force are based upon the theory that those who fight are the slaves, serfs, or chattels of those who do not fight, and that the bodies of those who fight, and their earning power, may be sacrificed in the common defense without legal obligation of any kind, and that whatever is paid to or on account of our war disabled is "gratuity" or common charity, all of which is contrary to every principle of our constitution and

all principles of free government; that charity does not pay legal debts; that petitioner does not desire charity, but asks only what is due him under the constitution and as a matter of natural right;

## XXVI.

That the earning power of man is property; that the earning power of man enters into every kind of property which is prepared for human use or consumption; that every article of merchandise contains, as its principle ingredient, the labor, the inventions, and the ingenuity of man; that every item of processed material used in war is essentially the product of the earning power of man; that the earning power of man is bought and sold on a tremendous scale every day; that the sale of a battleship, of an airplane, of a tank, or of any other paraphernalia of war, is a sale of the earning power of man;

## XXVII.

That the expenditure of the bodily integrity of man and of his earning power in battle or in any other type of military service in time of war is the taking of private property for a public use, for which the respondent is required to make [11] just compensation under the Fifth Amendment to the Constitution, the same as for earning power in the form of ships, planes, guns, or other processed articles of merchandise or materiel of war;

## XXVIII.

That the provisions of the Economy Act of

March 20, 1933, styled "An Act to Maintain the Credit of the United States Government," being Sections ..... et seq., of Title ....., U.S.C., is unconstitutional and violative of the provisions of the Fifth and Seventh Amendments to the Constitution of the United States, in that it deprives all disabled veterans of the wars of the United States of due process of law and a jury trial in the prosecution of their claims against the United States for impairment of bodily integrity and impairment of earning power;

#### XXIX.

That the constitutional provisions herein referred to are necessarily available to the citizen affected thereby without Congressional sanction; and are enforceable by the Courts of the United States; and that non-action or adverse action by Congress cannot nullify the constitution and deprive the citizen of the benefit of such constitutional provisions;

#### XXX.

That no consent to be sued, other than the consent implied from the Fifth Amendment, is necessary to entitle petitioner to maintain this action; that moreover, this is not an action for a specific recovery against the respondent, but is a proceeding for a judgment of this Court construing the constitutional provisions herein referred to; that this Court is a Court of general jurisdiction in all matters arising under the constitution or laws of the United States, and has jurisdiction to entertain this action; [12]

## XXXI.

That unless this Honorable Court take jurisdiction and grant petitioner the relief prayed for, he will be denied the benefit of the constitutional provisions herein referred to.

Wherefore, petitioner prays that this Honorable Court exercise its legal and equitable jurisdiction and enter a declaratory judgment herein, construing the said constitution and the 5th and 7th and 13th Amendments thereto, adjudging:

1. That under said Fifth Amendment the taking of the body and the earning power of petitioner for use in the military forces of respondent in said World War II was a taking of private property for a public use;

2. That the respondent is obligated not only under said Fifth Amendment, but as a matter of natural right, to make just compensation to petitioner and all other veterans, respectively, disabled in said war;

3. That petitioner and all other such war veterans are entitled, as a matter of constitutional right, to try their claims for bodily impairment in the district courts of the United States, and to have the jury trial guaranteed by said Seventh Amendment; and to pursue all remedies in the Courts of the United States applicable to actions at law or in equity;

4. That the United States has consented to be sued upon the claims of its war disabled, particularly those of World War II; that such consent

is implied from said Fifth Amendment, but that such consent is not necessary in an action for contribution;

5. That the provisions of the Economy Act of March 20, 1933, be adjudged to be unconstitutional and void;

6. For such other and further relief as to this Honorable Court shall be deemed meet or proper in the premises.

/s/ JOHN W. MAHAN,

/s/ C. E. PEW,

Attorneys for Petitioner.

In making reference to the foregoing petition to the decorations awarded to petitioner, I overcame his feeling of modesty, as I felt that the story would not be complete otherwise. I append this statement to save him embarrassment.

C. E. PEW,

Of Counsel.

Service of the foregoing amended petition and receipt of two copies thereof admitted this 23rd day of March, 1946.

JOHN B. TANSIL,

U. S. Atty.

HARLOW PEASE,

Ass't. U. S. Atty., Attys. for  
Respondent.

FRANCIS J. MCGAN,

Atty., Dep't. of Justice.

That on April 19, 1946, the Respondent, The United States of America, filed its Motion To Dismiss herein in the words and figures following, to-wit: [14]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the respondent above named and moves this Honorable Court for an order dismissing this cause on the grounds and for the reasons:

I.

That the amended petition for declaratory judgment fails to state a claim against this respondent upon which relief can be granted.

II.

That this Court is without jurisdiction to hear and determine this cause for the reason that the United States cannot be sued without its consent and such consent has not been given in this case.

Dated this 19th day of April, 1946.

JOHN B. TANSIL,  
United States Attorney.

/s/ HARLOW PEASE,  
Assistant United States At-  
torney.

/s/ FRANCIS J. McGAN,  
Attorney, Department of Jus-  
tice, Attorneys for Re-  
spondent.

(Affidavits of Service attached.)

[Endorsed]: Filed Apr. 19, 1946. [15]

That on July 25, 1946, the Opinion of the District Court was filed herein in the words and figures following, to-wit: [16]

[Title of District Court and Cause.]

### OPINION

Petitioner filed his amended petition for a declaratory judgment, alleging that he is a native born citizen of the United States and a resident of Helena, Montana; that the United States, acting under the Selective Training and Service Act of 1940, drafted him into the military service of the country on the 19th day of October, 1942; that he remained in such service until the 6th day of August, 1945; that upon being selected he took his basic training in infantry in the United States; that he was thereafter assigned to the Sixth Division of the United States Army; that with that Division he was sent to the Pacific theater of war on the 20th day of September, 1943, and took part in several major engagements against the Japanese Army while in that theater of operation; that while so fighting he was wounded in combat action and as a result he is totally unable to follow any substantially gainful occupation at manual work, continuously or at all; that prior to his induction into the Army he was earning \$200.00 a month and is now receiving from the Veterans Administration of the United States the sum of \$34.50 a month for his disabilities. He alleges his taking into the Army by the United States constituted slavery and



involuntary servitude condemned by the Thirteenth Amendment to the Constitution; that his body was [17] his private property and could not be taken without just compensation under the Fifth Amendment to the Constitution, and that he has a right to maintain the action against the United States without specific consent on its part to be sued other than the consent implied from the Fifth Amendment to the Constitution. He prays for a declaratory judgment of the Court, construing the Fifth, Seventh and Thirteenth Amendments to the Constitution, and declaring that his induction into the Army constituted a taking of his body, and its earning power, his private property, for public use and for which he was entitled to just compensation under the Fifth Amendment; that he has a right to a trial by jury in this court for a determination of the compensation to be paid him.

The respondent has filed a motion to dismiss on the grounds (1) that the amended petition fails to state a claim upon which relief can be granted, and (2) the Court is without jurisdiction to hear and determine this cause for that the United States cannot be sued without its consent and that such consent has not been given.

Extensive oral argument was had before the Court by counsel for the respective parties and a voluminous brief filed. The theory of the petitioner seems to be set out in the following paragraphs of his complaint, which read:

## “XV.

That by reason of the foregoing, petitioner has been damaged beyond the power of respondent to restore; but that he has been damaged financially to the extent of the cost of a comfortable livelihood, comparable to that enjoyed by the average citizen in comfortable financial circumstances; the cost of all necessary or beneficial hospitalization, and the cost of such education or vocational training as will enable petitioner to receive as much enjoyment out of his remaining life as is reasonably possible; [18]

## “XVIII.

That the body of petitioner was taken by respondent by virtue of said acts of Congress, and acting through its War Department and the officers and agents thereof, for a public use, to-wit: the defense of the United States against its enemies, and was used by said respondent for such purpose, and as the direct result of such use the body of petitioner has been injured and damaged and his earning power destroyed as herein set forth;

## “XXIII.

That under the pronouncement contained in said Declaration of Independence, and under said constitution and the amendments thereto above set forth or referred to, the body of petitioner is his own, and the earning power of his body is his property, and not the property of the United States or of any other group of its citizens; that under the institutions of liberty established by the Consti-

tution each citizen has equal right to life, liberty and the pursuit of happiness, and each citizen has an equal share in the sovereignty of the United States; that when in the course of human events a part of such citizens are required by law to sacrifice their liberty, the pursuit of happiness, and the integrity of their bodies, in the common defense, they do not thereby become the slaves, serfs, or chattels of those who do not fight; to be sacrificed without obligation; but under the compact under which we live, those disabled in the common defense are entitled, not only as a matter of natural right, as between sovereigns, but by the express terms of the Fifth Amendment to said constitution, to be restored as near as may be to a dignified and honorable status among the sovereign people of this democracy, and to just compensation; and they also have the right, as a corollary to the main proposition, to the due process of law and the jury trial in establishing that obligation, guaranteed by said constitution and its amendments; [19]

#### “XXVII

That the expenditure of the bodily integrity of man and of his earning power in battle or in any other type of military service in time of war is the taking of private property for a public use, for which the respondent is required to make just compensation under the Fifth Amendment to the Constitution, the same as for earning power in the form of ships, planes, guns, or other processed articles of merchandise, or material of war;

## “XXX

That no consent to be sued, other than the consent implied from the Fifth Amendment, is necessary to entitle petitioner to maintain this action; that moreover, this is not an action for a specific recovery against the respondent, but is a proceeding for a judgment of this Court construing the constitutional provisions herein referred to; that this Court is a Court of general jurisdiction in all matters arising under the constitution or laws of the United States, and has jurisdiction to entertain this action.”

The petitioner apparently bases his right to maintain this action upon the theory that his body is private property; that it is owned by him and such being true it falls within the perview of that portion of the Fifth Amendment to the Constitution which provides: “Nor shall private property be taken for public use without just compensation.” Counsel for petitioner have cited no authority holding that since the adoption of the Thirteenth Amendment to the Constitution the body of a human being within the United States is that character of private property referred to in the Constitutional Amendment, or is subject to private ownership. The argument advanced, that the body of the petitioner is private property owned by him which could not be taken for public use without just compensation, is pregnant with the admission that his body owned [20] by him is private property which could be taken for public use upon the payment of

just compensation. The taking of the character of private property contemplated by the Fifth Amendment for public use upon the payment of compensation is a taking not limited to times of war, but the right may be exercised equally as lawfully under the Constitution by the United States in times of peace, and to assert that one's body is private property that may be taken by the United States for any governmental purpose of any kind upon the payment of just compensation is to contend for something so far contrary to our theory of government, the relationship of the government and citizens as to be untenable.

In adopting the Constitution the people authorized the Congress to raise and support armies. Article 1, Section 8, Clause 12. This was not only an authorization to Congress, it was also a mandate to Congress to raise and support armies whenever the nation was in peril and under attack by a foreign power, and in enacting the Selective Training and Service Act of 1940 (Title 50 Appendix, U.S.C.A., Section 301 et. seq.) the Congress but carried out the constitutional authority granted it. *Selective Draft Law Cases*, 245 U. S. 366. The power to raise and support armies, granted to the Congress by the Constitution, is neither limited nor conditioned by the Section. It is an unrestricted grant of power unless, as contended by petitioner, the Fifth Amendment to the Constitution conditions the power of Congress to raise and support armies upon payment of just compensation to those inducted into the army. If, as contended by peti-

tioner, his body and its earning power in civilian pursuits is his own private property which cannot be taken without just compensation for a public use, then the taking of his body was not at the time he was injured, but at the time he was inducted into the army. It was at that time that he was prevented from capitalizing on its actual earning power in civilian pursuits and it was at that time that the right to just compensation [21] arose. If the United States paid the petitioner less than \$200.00 a month when he was first taken into the army, he was then earning less than he was when his body was taken, and under his theory just compensation would be the difference between what he was then being paid by the government and what he had been earning when he was taken. The fact that he was wounded and the earning power of his body permanently impaired operates only to entitle him to further compensation for a permanent impairment after his discharge, whereas had he been discharged unwounded and in good bodily health, the payment of just compensation by the government during the time he was in the army and up to and including his charge would have absolved the government from further obligation. Thus if petitioner's theory is correct, it would appear that in raising an army the United States immediately was under an obligation to pay to every man inducted into the armed forces under the Selective Training and Service Act just compensation for the taking of the body and its earning power and was under a like obligation to pay just compensation to each

conscientious objector, who was assigned to and compelled to do work of a national importance under the Selective Training and Service Act, because of the taking of his body and its earning power, and each of them immediately became vested with a cause of action against the United States properly triable in this court and before a jury to have the amount of that just compensation fixed.

An examination of the authorities discloses that the contention made here has been uniformly rejected by every court before whom it has been raised. In *Jacobson v. Massachusetts*, 197 U. S. 11, at page 29, the Supreme Court said: "The liberty secured by the Fourteenth Amendment, this Court has said, consists, in part, in the right of a person 'to live and work where he will', *Allgeyer v. Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his precuniary interests, [22] or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." (Emphasis supplied).

In *United States v. MacIntosh*, 283 U. S. 605 at 620, the Supreme Court said: "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. The common defense was one of the purposes for which the people ordained and established the Constitution \* \* \*. We need not refer to the numerous statutes that contemplate defense of the United

States, its Constitution and laws by armed citizens". At page 622 the Court continues: "The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense'. In express terms Congress is empowered 'to declare war', which necessarily connotes the plenary power to wage war with all of the force necessary to make it effective; and 'to raise \* \* \* armies', which necessarily connotes the like power to say who shall serve in them and in what way. From its very nature, the war power, when necessity calls for its exercise, tolerates no qualification or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams 'this power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life'. To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the Army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that



term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war. These are but illustrations of the breadth of power." This language is not departed from by the Supreme Court in *Girouard v. United States*, . . . . . U. S. . . . ., decided April 22, 1946.

"It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, *Law of Nations*, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force." *Selective Draft Law Cases*, *supra*, at 378.

"Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives the appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime, also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection." *Hopper v. United States*, 142 Fed. (2d) 181 at 186 (C.C.A. 9). *Tatum v. United States*, 146 Fed. (2d) 406 (C.C.A. 9).

Local Draft Board No. 1 of Silver Bow County, Montana v. Conners, 124 Fed. (2d) 388 (C.C.A. 9).

“In view of the breadth of the war power as indicated by the above cases and the cases cited therein, we have no doubt that the system devised for the treatment of persons who by reason of religious training and belief are conscientiously opposed to participation in war in any form does not deprive them of any of their constitutional rights even though, in practical effect, it deprives them of their full liberty and requires them to work at a rate of compensation far below that which could be earned in civilian life and even below what could be earned in the armed forces.” *Weightman v. United States*, 142 Fed. (2d) 188 at 191.

From the foregoing authorities it is apparent that the contention made that the power granted Congress by Article 1, Section 8, Clause 12, to raise and support armies is conditioned or dependent upon the payment of just compensation to those taken into the armed forces, and that such taking constitutes a taking of private property without just compensation, as condemned by the Fifth Amendment to the Constitution, is without merit.

Petitioner next contends that in being taken into the army, as he was taken, he became a slave or serf and was subjected to involuntary servitude in violation of the Thirteenth Amendment to the Constitution.

On the face of it, it is difficult to understand how it can be asserted by a free man, that while fight-

ing to protect his own freedom and to defend and support the Constitution and the form of government that guarantees him the continuance of that freedom and prevents his enslavement, he is then a slave or serf. Upon examination of the authorities it appears that this contention is equally without merit. "Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme [25] and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." *Selective Draft Law Cases*, *supra*, at 390. *Hopper v. United States*, *supra*.

"The answer to appellant's complaint lies in the broad principle that the Thirteenth Amendment has no application to a call for service made by one's government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property \* \* \*. During the first World War convictions for refusing army service were attacked as violations of this amendment. The contention was overruled without being dignified by being argued \* \* \*. The present war is described by its authors as 'total war', meaning that every means of destruction will be used, and men, women and children alike killed. It means

also that total effort may be necessary to resist it, men, women and children all doing what they can. Such a total call has not yet been made by the United States, but is within its power under those parts of the Constitution which authorize Congress to declare war and raise and equip armies. There can be no doubt whatever that Congress has the constitutional power to require appellant, an able-bodied man, to serve in the army, or in lieu of such service to perform other work of national importance. The Thirteenth Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need." *Heflin v. Sanford*, 142 Fed. (2d) 798 (C.C.A. 5).

"The right of Congress to impose upon our citizenry the burden of serving in the armed forces is not questioned. The Supreme Court \* \* \* makes clear the power of Congress to enlist the manpower of the nation for the prosecution of war and to subject to military service both the willing and unwilling." *Tatum v. United States*, 146 Fed. (2d) 406 (C.C.A. 9).

In view of the unbroken line of decisions of the Supreme Court and of the Circuit Courts of Appeal from the inception of our government, it does not appear how, at this date, it could be earnestly contended that consent on the part of the United States to be sued is not necessary to the maintenance of this action. In *Lynch v. United States*, 292

U. S. 571, the Supreme Court said: "The rule that the United States may not be sued without its consent is all embracing \* \* \*. The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *DeGroot v. United States*, 5 Wall. 419, 431; *United States v. Babcock*, 250 U. S. 328, 331; and to those arising from some violation of rights conferred upon the citizen by the Constitution, *Schillinger v. United States*, 155 U. S. 163, 166, 168."

"The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government." *Schillinger v. United States*, 155 U. S. 163 at 166. [27]

The contention made that aside from any act of Congress this Court has jurisdiction of the action because of the provisions of the Fifth Amendment to the Constitution is equally untenable.

It is too well settled to be the subject of argument that the Federal District Courts have only such jurisdiction as the Congress may give them. "All Federal Courts, other than the Supreme Court,

derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, Section 1 of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe \* \* \*. The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to the Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U. S. 182 at 187.

It is equally well recognized that Congress may create rights in individuals against the United States and establish special tribunals, aside from the courts, to administer and enforce the rights created. Congress is not required to provide that the enforcement of those rights in a contest between the individual and the United States be through the courts, although it may well have done so. "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States v. Babcock*, 250 U. S. 328, 331. It may limit the individual to administrative remedies. *Tutun v. United States*, 270 U. S. 568, 576." *Lynch v. United States*, *supra*, at 582. *c.f.* *Silberschein* [28] *v. United States*, 266 U. S. 221.

Congress has created rights against the United States insofar as the plaintiff in the action is concerned, in the enactment of the World War Veterans Act of 1924, 38 U.S.C.A., 421 et. seq., and similar legislation. It provided also for the administration and enforcement of these rights by the Administrator of Veterans Affairs. It thus created a special tribunal to administer, execute and enforce its legislation as it had the constitutional power to do. The argument that Section 426 of Title 38, U.S.C.A. and Section 705 of Title 38, U.S.C.A., giving to the Administrator the power to decide all questions arising, making his decisions on questions of fact conclusive and providing that no court of the United States shall have jurisdiction to review such decisions, is an unconstitutional exercise of the power of Congress is without merit. It is but an exercise of its constitutional power to give or withhold from the District Courts such jurisdiction as it sees fit. If, as contended, Congress was unwise in so providing in this instance, the only relief to plaintiff is by Congressional action and not by an appeal to the courts.

Congress has frequently exercised its right to establish special tribunals for the enforcement of rights against the United States, containing like provisions as to the finality of the findings of the tribunals as to questions of fact and Congress has uniformly been sustained, as for illustration Section 310 of Title 50, Appendix, U.S.C.A. with reference to the decisions of the local draft boards, Local Draft Board No. 1 of Silver Bow County, Montana,

v. Connors, *supra*; the Emergency Price Control Act of 1942 establishing the Emergency Court of Appeals and withholding from the lower Federal Courts jurisdiction to pass upon the questions passed upon by that Court and [29] making its decisions reviewable only by the Supreme Court. *Yakus v. United States*, 321 U. S. 414. Many other illustrations could be cited.

From the foregoing it necessarily follows that no actual controversy of a justifiable nature does or can exist and the motion made by the respondent to dismiss the action should be and hereby is sustained upon each of the grounds set forth in the motion and the action is ordered dismissed.

The petitioner is granted an exception to the ruling of the Court.

R. LEWIS BROWN,  
United States District Judge.

[Endorsed]: Filed July 25, 1946. [30]



That on July 30, 1946, Judgment was entered herein in the words and figures following, to-wit:

In the District Court of the United States  
for the District of Montana  
Helena Division

No. 276

EDWARD C. COMMERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

### JUDGMENT

This cause came on regularly for hearing before this Court, Honorable R. Lewis Brown, Judge, presiding, on the defendant's motion that the same be dismissed. After considering the argument of counsel and briefs of the parties, the Court filed its opinion sustaining said motion.

Wherefore, it is hereby Ordered, Adjudged and Decreed that this action be and the same is hereby dismissed.

Dated at Butte, Montana, this 29th day of July, 1946.

/s/ R. LEWIS BROWN,  
Judge.

Entered July 30, 1946. H. H. Walker, Clerk.

[Endorsed]: Filed July 29, 1946 [32]

That on July 30, 1946, an Order directing Clerk to correct typographical error in said Judgment was made and entered in the minutes of said District Court in the words and figures following, to-wit:

[Title of District Court and Cause.]

It appearing to the Court that in the judgment heretofore signed in this cause by the court on the 29th day of July, 1946, it is recited therein that the cause came on for hearing on the plaintiff's motion that the same be dismissed; the fact is the cause came on for hearing on the defendant's motion that the same be dismissed and the recital in the judgment otherwise is a typographical error inserted through inadvertance and mistake and on application of Francis J. McGan, one of the counsel for the respondent, said judgment is ordered amended and corrected to state the truth in the recital thereof by the striking therefrom of the word "plaintiff's", the second word in the third line of the judgment, and inserting in lieu thereof the word "defendant's", and said correction to be made by the Clerk of this court.

Entered in open Court at Butte, Montana, July 30, 1946.

H. H. WALKER,  
Clerk. [34]

That on August 1, 1946, the said Petitioner filed herein his Notice of Appeal in the words and figures following, to-wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL.

To the above named Respondent, and to The Honorable John B. Tansil, United States Attorney, and the Honorable Francis J. McGan, Attorney, Department of Justice, Attorneys for said Respondent:

You and each of you will please take notice that the above named petitioner hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the final judgment given, made, rendered and entered in the above entitled District Court, on the 29th day of July, 1946, as amended and corrected by order of said District Court dated and entered July 30, 1946, dismissing the above entitled cause; and petitioner appeals from the whole of said judgment.

Dated August 1st, 1946.

JOHN W. MAHAN,

C. E. PEW,

Attorneys for Petitioner,  
and Appellant.

[Endorsed]: Filed Aug. 1, 1946. [36]

That on August 1, 1946, the said Petitioner filed herein his Bond for Costs On Appeal in the words and figures following, to-wit: [37]

[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL.

Know All Men by These Presents: That Edward C. Commers, as principal, and Cora Read Pew and John J. Tomcheck, as sureties, hereby acknowledge themselves jointly and severally firmly bound unto the above named Respondent, the United States of America, in the sum of Two Hundred and Fifty Dollars (\$250.00), lawful money of the United States, for the payment of which, well and truly to be made, we and each of us, respectively, bind ourselves and our and each of our heirs, executors and administrators, jointly and severally as aforesaid, firmly by these presents.

Sealed with our seals and dated this 1st day of August, 1946.

The condition of the above obligation is such that whereas, the petitioner is appealing to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above entitled District Court entered in the above entitled cause on July 29th, 1946, as amended and corrected by order of said Court dated July 30, 1946, dismissing the above entitled cause;

Now, Therefore, if the plaintiff shall pay the costs of appeal if the appeal is dismissed or said judgment affirmed, [38] or such costs as said Appellate Court may award if said judgment is modified, then this

obligation to be void; otherwise to remain in full force and effect.

[Seal]            EDWARD C. COMMERS,  
[Seal]            CORA READ PEW,  
[Seal]            JOHN J. TOMCHECK.

State of Montana,  
County of Lewis and Clark—ss.

Cora Read Pew and John J. Tomcheck, the sureties named in the foregoing bond, being first duly sworn, each for himself and herself, says: I am a resident and freeholder and householder within the County of Lewis and Clark, State of Montana, and am worth double the amount of the within bond, over and above all my just debts and liabilities, and not including property exempt from execution.

CORA READ PEW,  
JOHN J. TOMCHECK.

Subscribed and sworn to before me this 1st day of August, 1946.

[Seal]            JOHN W. CHAPMAN,

Notary Public for the state of Montana, residing at Helena, Montana. My commission expires June 7, 1949.

[Endorsed]: Filed Aug. 1, 1946. [39]

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That on August 3, 1946, the parties filed herein their Stipulation designating the parts of the record and proceedings to be included in the record on appeal in words and figures following, to-wit: [40]

[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated and agreed, by and between the parties to the above entitled cause, through their respective attorneys, that the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, under the appeal now being prosecuted by the above named petitioner, shall embody copies of all of the pleadings and other papers filed herein, other than the original petition; such record to embody copies of the amended petition, the motion of respondent to dismiss, the opinion of the Court, the judgment entered on July 29, 1946, the order amending and correcting said judgment, entered on July 30, 1946, the notice of appeal, the bond for costs on appeal, and this stipulation.

Dated at Butte, Montana, this 2nd day of August, 1946.

JOHN B. TANSIL,  
United States Attorney,  
District of Montana.

HARLOW PEASE,  
Assistant United States At-  
torney, District of Montana.

FRANCIS J. MCGAN,  
Attorney, Department of Jus-  
tice, Attorneys for Respond-  
ent.

JOHN W. MAHAN,  
C. E. PEW,  
Attorneys for Petitioner.

[Endorsed]: Filed Aug. 3, 1946. [41]

In the District Court of the United States in and  
for the District of Montana, Helena Division

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 41 pages numbered consecutively from 1 to 41 is a full, true and correct transcript of the record on appeal as designated by the stipulation of the parties and by rule, in case No. 276, Edward C. Commers, Petitioner, v. The United States of America, Respondent.

I further certify that the costs of said transcript amount to the sum of Nine and 10/100 dollars (\$9.10), and have been paid by the appellant.

Witness my hand and the seal of said District Court this 5th day of August, 1946.

[Seal]                    H. H. WALKER,  
Clerk. [42]

[Endorsed]: No. 11404. United States Circuit Court of Appeals for the Ninth Circuit. Edward C. Commers, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed Aug. 14, 1946.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11404

EDWARD C. COMMERS,

Petitioner and Appellant,

vs.

THE UNITED STATES OF AMERICA,

Respondent and Appellee.

POINTS RELIED UPON BY APPELLANT  
AND DESIGNATION OF PARTS OF REC-  
ORD TO BE PRINTED.

To the Clerk of said Circuit Court of Appeals,  
San Francisco, California.

Sir:

The Appellant hereby states the points upon which he intends to rely in this appeal, and designates the parts of the record he thinks necessary for the consideration of said points, as follows:

POINTS TO BE RELIED UPON BY  
APPELLANT:

1. That the petitioner and appellant, who is and was at all times mentioned in the amended petition, a citizen and resident of the United States and of the State of Montana, and was never convicted of crime, was conscripted, under the Selective Service Act of the Congress of the United States, into the armed forces of the United States in the war be-



tween the United States and the Axis Powers following December 7, 1941;

2. That he served in the infantry in said war, under the War Department, fighting against the enemies of the United States, and in said service, in line of duty, he received wounds and injuries, and in said service contracted disease, from all of which his earning power was greatly impaired and he became totally disabled;

3. That the bodily integrity and earning power of man are property of the highest grade, and are the private property of the person who possesses them;

4. That petitioner's body was taken for a public use, and his bodily integrity and earning power were consumed in a public use;

5. That under the United States Constitution, and particularly under the Fifth Amendment thereof, the United States owes petitioner the obligation to justly compensate him for his impaired bodily integrity and lost earning power;

6. That Respondent denies any obligation to its war disabled, including petitioner, but makes some provision for small gifts, or charity;

7. That the Court has jurisdiction of this action under the provision of Section 400, Title 28, U.S.C.;

8. That this Court has jurisdiction of actions against the United States for just compensation for the impairment of bodily integrity and of

earning power to the men who have become disabled in war service;

9. That no consent of Congress is necessary to suit upon the obligation of the Respondent to its war disabled.

DESIGNATION OF PARTS OF RECORD APPELLANT THINKS NECESSARY FOR THE CONSIDERATION OF THE FOREGOING POINTS:

The entire record as filed in the above entitled Court by the Clerk of the District Court.

Dated August 5th, 1946.

/s/ JOHN W. MAHAN,  
C. E. PEW,  
Attorneys for Appellant.

(Acknowledgment of Service.)

Endorsed]: Filed August 14, 1946.

PAUL P. O'BRIEN,  
Clerk.